Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

RICHARD TOMIC,

Petitioner,

v.

CATHOLIC DIOCESE OF PEORIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a ministerial exception to federal employment discrimination laws bars the courts from adjudicating an age-discrimination complaint brought by a lay employee of a religious organization who was terminated from a position not reserved for members of a particular faith, where the religious organization has raised no defense that the discrimination was religiously motivated.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Richard Tomic respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a-11a) is reported at 442 F.3d 1036. The decision of the district court (Pet. App. 13a-19a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 4, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the First Amendment, the Age Discrimination in Employment Act, and the Religious

Freedom Restoration Act are set forth in the appendix to this petition (Pet. App. 43a-45a).

STATEMENT

1. In March 1996, petitioner was hired by the Catholic Diocese of Peoria as the organist and music director for St. Mary s Cathedral in Peoria. In July 1998, petitioner assumed the additional position of organist and music director for the Diocese. He performed his duties in exemplary fashion until March 25, 2003, when he was terminated without warning and without any opportunity to appeal his termination. Just before his termination, petitioner was told that the Diocese was hiring a new organist and choir director to assist him. Petitioner was then 52 years old. He was replaced by someone around 30 years old. Pet. App. 14a, 22a-23a.[1]

As organist and music director of the Cathedral, petitioner s duties included preparing music, recruiting and training choir members, conducting rehearsals, and playing the organ at all weekend and special parish masses at the Cathedral. His duties as music director of the Diocese included maintaining records of resources and personnel, reviewing musical resources available, organizing logistics of presentations, presenting expenses for reimbursement, and submitting requests for salary payments. Pet. App. 1a-2a, 29a-38a. Neither position authorized petitioner to make decisions about Catholic liturgy. Petitioner agreed to accept the direction of the Director of the Office of Divine Worship, the Vicar General/Moderator of the Curia or the Bishop in the exercise of responsibilities. *Id.* at 30a.

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[1] This case was resolved on a motion to dismiss, and so the factual allegations in the complaint must be taken as true, and all reasonably drawn inferences must be drawn favor of petitioner. *See Hishon* v. *King & Spalding*, 467 U.S. 69, 73 (1984). There was no discovery in this case about the exact nature of petitioner s duties, his relationship to the hierarchy of the Diocese, or the Diocese s reasons, asserted or actual, for terminating petitioner.

Petitioner s employment was governed by the Diocese s Handbook of Personnel Policies, which covered such matters as lunch hours, vacation time, maternity leave, unemployment compensation, and health insurance benefits. Pet. App. 39a-42a. The Handbook stated that [t]he Diocese ... is an Equal Opportunity Employer, and candidates for employment shall be considered on the basis of their qualifications, without regard to race, color, sex, age, physical handicap, national origin, or ancestry, although preference is generally given to persons of the Roman Catholic faith. *Id.* at 42a. The Handbook nowhere suggests, however, that petitioner s positions were reserved for persons of the Catholic faith. A separate provision in the Handbook, covering [r]eligious [e]mployees, stated that [r]eligious working in the diocesan offices will be governed by the policies herein contained [*i.e.*, in the Handbook], except in cases in which there is a conflict between these policies and the obligation of their state in life, which conflicts were to be settled by church officials, including the Bishop. *Id.*

2. After exhausting his remedies with the Equal Employment Opportunity Commission, petitioner filed suit in district court, alleging that the Diocese had terminated him on account of his age, in violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621. The Diocese did not answer the complaint and, in particular, did not assert that petitioner was terminated for any reason having to do with Catholic doctrine, or that petitioner was terminated because his performance of his duties had somehow impaired Catholic worship.[2] Rather, the Diocese argued that, as a matter of law, it could not be liable for age discrimination in firing petitioner because its actions fell within the judicially-

[2] In his complaint, petitioner noted that, just before his termination, he had had discussions with the Bishop s assistant, in which petitioner expressed his concern about the impact of *scheduling* of choir practices for Holy Week and Easter. The complaint does not suggest, however, that petitioner had any disagreements with anyone in the Church hierarchy about the substance of musical choices for holy worship, and the Diocese has made no such argument. *See* Pet. App. 22a-23a.

crafted ministerial exception to federal anti-discrimination laws. That exception, as explained below, is not rooted in the text of the major federal anti-discrimination statutes, but rather reflects a judgment that, in certain circumstances (on which the lower courts vary widely), it would be unconstitutional to apply those laws to decisions by religious organizations about the composition of their clergy.

The district court agreed with the Diocese that the ministerial exception applied here and dismissed the complaint. In so doing, the court rejected petitioner s arguments that the ministerial exception is inapplicable to this case because (a) petitioner was not an ordained member of the Catholic clergy and did not play a core religious function within the Church, and (b) he was not terminated for any religious reason, *i.e.*, any reason even assertedly based in Catholic doctrine. According to the district court, petitioner s duties and functions ... were integral to the spiritual and pastoral mission of the Diocese, thereby falling within the contours of the ministerial exception. As such, his claims ... involve ecclesiastical decisions that are placed beyond the subject matter jurisdiction of the Court by the Free Exercise Clause of the First Amendment. Pet. App. 18a.

3. The court of appeals affirmed. Pet. App. 1a-11a. The court first remarked that [f]ederal courts are secular agencies. They therefore do not exercise jurisdiction over the internal affairs of religious organizations. *Id.* at 2a. Further, the court elaborated, [e]ven if the suit does not involve an issue of religious doctrine, but concerns merely the governance structure of the church, the courts will not assume jurisdiction if doing so would interfere with the church s management. *Id.* at 3a-4a. This rule, the court stated, rested on the fundamental right of churches to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine. *Id.* at 4a (quotation omitted).

Based on those principles, the court concluded that federal anti-discrimination laws cannot provide any protection to ministers who suffer employment discrimination, even

when the reason for the discrimination has nothing to do with religious doctrine. The court reasoned that, in investigating employment discrimination claims by ministers against their church, secular authorities would necessarily intrude into church governance in a manner that would be inherently coercive, even if the alleged discrimination were purely nondoctrinal. Pet. App. 4a (quotation omitted).

The court acknowledged that [t]he ministerial exception, and the hands-off approach more generally, do not place the internal affairs of religious organizations wholly beyond secular jurisdiction. Pet. App. 5a. It noted, for example, that courts have adjudicated property disputes within congregations and claims for wages by employees of religious organizations. *See id.* These examples, the court stated, show that federal courts cannot always avoid taking a stand on a religious question. *Id.* For example, in a dispute over property between church components, even if the court were inclined to accept the word of the highest authority within the church as to the proper ownership of the property, at a minimum the court must determine what is that highest authority. *Id.* at 6a. Similarly, in a suit by a janitor for wages, a church could not avoid adjudication simply by asserting that the janitor was a minister ; the court would have to determine whether under the actual law of the church in question (and not as a subterfuge) janitors really were ministers. *Id.*

Nonetheless, the court concluded, those principles did not permit adjudication of this employment-discrimination suit. The court did note that [i]t might seem that unless a church had a doctrine placing limitations of age, race, ethnic origin, disability, or sex on ministers, the application of laws forbidding employment discrimination would not involve the court in theological controversy. Pet. App. 6a. But this is not correct, the court stated, because the church would be likely to defend its employment action on grounds related to church needs rooted in church doctrine. *Id.* And, the court speculated, if this case were allowed to go forward, the diocese would argue that he was dismissed for a religious rea-

son [petitioner s] opinion concerning the suitability of particular music for Easter services and the argument could propel the court into a controversy, quintessentially religious, over what is suitable music for Easter services. *Id.* at 6a-7a. The court also theorized that petitioner would argue that the church s criticism of his musical choices was a pretext for firing him, that the real reason was age ; that [t]he church would rebut with evidence of what the liturgically proper music is for an Easter Mass and [petitioner] might in turn dispute the church s claim. The court would be asked to resolve a theological dispute. *Id.* at 7a.[3]

The court also rejected petitioner s argument that his position as organist and music director should not implicate the ministerial exception because it did not involve religious duties. Pet. App. 7a. Without the benefit of any discovery in this case about petitioner s duties, the court stated that [a]mong [petitioner s] duties as music director was that of selecting the music to be played at the various masses. That duty required him to make a discretionary religious judgment because the Catholic Church does not have rules specifying what piece of music is to be played at each type of mass. *Id.*[4] Stressing that [m]usic is an integral part of many different religious traditions, the court further concluded that petitioner s tasks were traditionally ecclesiastical or religious. *Id.* at 8a (quotation omitted). The court acknowledged that [t]he rector or bishop could override [petitioner s] choices of what music to play, but that possible disagreement, the court again theorized, could convince the ecclesiastical authorities that they would be better off

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[3] In fact, the Diocese has never asserted that petitioner was fired for a religious reason. Nor has petitioner ever suggested that he would attempt to dispute any assertions by the Diocese about the liturgically proper music for an Easter Mass.

[4] For the proposition that the Catholic Church has no rules specifying what music is to be played at mass, the court relied not on anything in the record, but on a secondary source that had not been cited by either party. *See* Pet. App. 7a.

with someone else in the job. *Id.* Thus, the court concluded, if petitioner were protected from age discrimination by the ADEA, the ability of the church and the diocese to remove him will be inhibited unless the ministerial exception is applicable. *Id.*

The court found this case distinguishable from *DeMarco* v. *Holy Cross High School*, 4 F.3d 166 (2d Cir. 1993), in which the Second Circuit conclu`ed that the ministerial exception to the ADEA did not bar an age discrimination suit brought by a teacher at a Catholic high school. In *DeMarco*, the teacher alleged that he was fired because of his age; the school maintained that the teacher was fired because of his failure to perform religious duties, including failure to begin his classes with prayer and failure to attend Mass with his students. *Id.* at 168; *see* Pet. App. 8a. The court acknowledged that *DeMarco* was just across the line from this case. Pet. App. 8a. It nonetheless believed that *DeMarco* was significantly different because in that case, the fundamental question was whether De Marco either did or did not lead his students in prayer and attend mass. *Id.* at 8a-9a. Those issues, the court stated, were simple questions of fact, unlike the wisdom or propriety of [petitioner s] choice of music to play at an Easter Mass (*id.* at 9a) which neither party has put at issue in this case. The court also stated, again without the benefit of record evidence, that the music director of a Catholic church and diocese is more like a clergyman than a math teacher. *Id.*[5]

Finally, the court addressed *sua sponte* an issue raised by the Second Circuit s recent decision in *Hankins* v. *Lyght*,

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[5] Continuing its theme that, as a matter of law, a music director is equivalent to a clergyman, the court dismissed as insignificant the Diocese s Handbook, in which the Diocese represents itself to be an equal opportunity employer, specifically with respect to age. Pet. App. 9a. [I]t is very unlikely, the court suggested, that the representation should be interpreted to embrace religious functionaries, such as the music director. *Id.* The court noted that the Handbook forbids ... discrimination on the grounds of sex, though women of course cannot be Catholic priests. *Id.*

441 F.3d 96 (2d Cir. 2006), in which that court concluded that the ministerial exception to anti-discrimination laws has been superseded by the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb-1. The court noted that, if RFRA were applicable instead of the judicially-crafted ministerial exception, the courts have to decide whether application of the ADEA to a particular case imposes a substantial burden on religious activity. Pet. App. 10a. The court concluded that *Hankins* was unsound because RFRA is applicable only to suits to which the government is a party. *Id.* The court found it unlikely that Congress, dropping nary a hint, wiped out a long-established doctrine that gives greater protection to religious autonomy than RFRA does, and stated that a serious constitutional issue would be presented if Congress by stripping away the ministerial exception required federal courts to decide religious questions. *Id.* at 11a.

REASONS FOR GRANTING THE PETITION

A. This Court s Review Is Needed To Clarify The Application And Scope Of The Ministerial Exception To Employment Discrimination Law

The court of appeals held in this case that the Constitution forbids the courts from entertaining an employment discrimination complaint brought by a lay employee of a religious institution, even though that employee was not holding a position reserved for members of the faith, and even though the defendant employer has never contended that the employee was terminated for religious reasons. For that conclusion, the court relied on the so-called ministerial exception, which the lower courts have fashioned to prevent a collision between two interests of the highest order: the Government s interest in eradicating discrimination in employment and the constitutional right of a church to manage its own affairs free from governmental interference. [6]

[6] *EEOC* v. *Catholic Univ. of Am.*, 83 F.3d 455, 460 (D.C. Cir. 1996).

Although it is common ground that the Constitution places *some* limits on the application of employment discrimination laws to religious organizations, little else about the ministerial exception is certain. In the absence of guidance from this Court, which has never addressed the issue, the lower courts have reached varying positions on the scope of this exception.

The Fourth, Fifth, Seventh, and D.C. Circuits have articulated that exception generously (as demonstrated by the decision below), essentially ruling that no employment discrimination claim may ever be brought by a minister and also defining the category of minister broadly to include any lay employee whose function relates to the propagation of the church s religious message.[7] By contrast, the Second, Third, and Eighth Circuits have taken a narrower and more nuanced approach to the issue.[8] In those circuits, whether an employment discrimination complaint may proceed against a religious organization focuses primarily not on whether the employee had religious duties, but on whether the courts will have to resolve the validity of a religious reason proffered by the employer for the adverse employment decision.[9] The Ninth Circuit has held that even ministers

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[7] *See, e.g., EEOC* v. *Roman Catholic Diocese*, 213 F.3d 795 (4th Cir. 2000); *Rayburn* v. *General Conference of Seventh-Day Adventists*, 772 F.2d 1164 (4th Cir. 1985); *Starkman* v. *Evans*, 198 F.3d 173 (5th Cir. 1999); *Alicea-Hernandez* v. *Catholic Bishop of Chi.*, 320 F.3d 698 (7th Cir. 2003); *Catholic Univ.*, 83 F.3d 455.

[8] Although, as noted above, the Second Circuit has held that RFRA has displaced the judicially-created ministerial exception, its approach to the ministerial exception is still relevant for the insight it provides into how that court will assess whether neutral, generally applicable anti-discrimination statutes impose a substantial burden on religious organizations under RFRA.

[9] *See DeMarco* v. *Holy Cross High Sch.*, 4 F.3d 166 (2d Cir. 1993); *Geary* v. *Visitation of the Blessed Virgin Mary Parish Sch.*, 7 F.3d 324 (3d Cir. 1993); *Weissman* v. *Congregation Shaare Emeth*, 38 F.3d 1038 (8th Cir. 1994); *see also Petruska* v. *Gannon Univ.*, 448 F.3d 615 (holding that courts could adjudicate a sex-discrimination claim brought by a chaplain of a religious-affiliated university), *vacated for panel rehearing*, No. 05-1222,

may bring some kinds of employment discrimination claims (in particular, sexual harassment and retaliation claims, including those involving constructive discharge), although ministers may not bring claims based on the actual termination of their employment as such.[10] And as if this confusion were not enough, the Second Circuit has recently held that the entire ministerial exception has been superseded by the Religious Freedom Restoration Act a ruling that the court below squarely rejected.[11]

This Court s clarification of the permissible application of employment discrimination laws to religious organizations is sorely needed. The lower courts have found guidance from different lines of this Court s precedents to support their conclusions. The Fourth, Fifth, Seventh, and D.C. Circuits have emphasized this Court s decisions recognizing the autonomy of churches to settle their own internal affairs and stressing that courts may not adjudicate fundamentally religious controversies.[12] These circuits have read those decisions as requiring a judicially-created exception to the otherwise generally applicable anti-discrimination statutes. And they have reaffirmed this exception even in the wake of *Employment Division* v. *Smith*, 494 U.S. 872 (1990), which rejected the argument that the Free Exercise Clause re-

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2006 U.S. App. LEXIS 15088 (3d Cir. June 20, 2006). *But see Scharon* v. *St. Luke s Episcopal Presbyterian Hosps.*, 929 F.2d 360 (8th Cir. 1991) (concluding that courts could not adjudicate a priest s age and sex discrimination claims without running afoul of the First Amendment).

[10] *Compare Elvig* v. *Calvin Presbyterian Church*, 375 F.3d 951, 964-965 (9th Cir. 2004); *Bollard* v. *California Province of Soc y of Jesus*, 196 F.3d 940, 944-947 (9th Cir. 1999) *with Werft* v. *Desert Sw. Annual Conference of the United Methodist Church*, 377 F.3d 1099, 1100, 1104 (9th Cir. 2004) (per curiam).

[11] *See Hankins* v. *Lyght*, 441 F.3d 96 (2d Cir. 2006).

[12] *See, e.g., Serbian E. Orthodox Diocese* v. *Milivojevich*, 426 U.S. 696 (1976); *Presbyterian Church* v. *Mary Elizabeth Blue Hull Mem l Presbyterian Church*, 393 U.S. 440 (1969); *Kedroff* v. *St. Nicholas Cathedral*, 344 U.S. 94 (1952); *Gonzalez* v. *Roman Catholic Archbishop of Manila*, 280 U.S. 1 (1929).

quires exemptions from generally-applicable laws.[13] In their view, *Smith* only addressed an *individual s* Free Exercise right and is therefore inapplicable to statutes that govern *organizations*, which remain entitled to autonomy in their internal affairs.[14]

The Second, Third, Eighth, and Ninth Circuits have found more helpful guidance from this Court s decisions holding that religious organizations have no general immunity from an obligation to comply with secular law,[15] including *Smith* s holding that the Free Exercise Clause does not prohibit the application of neutral, secular legal principles to religious organizations.[16] Only this Court can make clear how the competing concerns of eradicating invidious employment discrimination and protecting the right of religious organizations to maintain their religious message free of governmental interference may be properly reconciled.

This case presents a particularly suitable vehicle for resolution of these issues. Under the decision below, a layperson who was fired because of his age has no legal recourse whatever even though the church has never contended that the termination of his employment had anything

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[13] 494 U.S. at 878-882; *see Catholic Univ.*, 83 F.3d at 461-463; *Combs v. Central Tex. Annual Conference of the United Methodist Church*, 173 F.3d 343, 347-350 (5th Cir. 1999); *Roman Catholic Diocese*, 213 F.3d at 800 n.*. The Seventh Circuit has not directly addressed the issue, although it has continued to apply the exception post-*Smith*, as it did below.

[14] *Catholic Univ.*, 83 F.3d at 461-463; *Combs*, 173 F.3d at 347-350; *Roman Catholic Diocese*, 213 F.3d at 800 n.*; *see also Bryce* v. *Episcopal Church*, 289 F.3d 648, 656-657 (10th Cir. 2002); *Gellington v. Christian Methodist Episcopal Church, Inc.*, 203 F.3d 1299, 1302-1304 (11th Cir. 2000).

[15] *See, e.g., Tony & Susan Alamo F[illegible]* v. *Secretary of Labor*, 471 U.S. 290 (1985); *United States* v. *Lee*, 455 [illegible]252 (1982); *Jones* v. *Wolf*, 443 U.S. 595 (1979); *Maryland & Va. Eldership of the Churches of God* v. *Church of God at Sharpsburg, Inc.*, 396 U.S. 367 (1970).

[16] *See, e.g., Geary*, 7 F.3d at 327; *Elvig* v. *Calvin Presbyterian Church*, 397 F.3d 790, 792 (9th Cir. 2005) (Fletcher, J., concurring in the denial of rehearing en banc).

to do with religious doctrine, and even though his position was not reserved for members of the Catholic faith. It is difficult to see why the constitutional value of protecting religious freedom shields this kind of action from legal scrutiny. Moreover and contrary to the court of appeals speculation about how this litigation might unfold if it were not dismissed on the pleadings there is no reason to believe that a court adjudicating petitioner s age discrimination case would be required to determine whether any *religious* justification that the Diocese might theoretically offer for petitioner s termination was valid under Catholic doctrine. The courts of appeals that have allowed discrimination complaints to proceed have made clear that, where a religious organization proffers a religious justification for an adverse employment action, the courts may not question whether that justification is in fact rooted in religious doctrine. Rather, the courts must confine their inquiry to determining whether that justification was *in fact* the reason for the adverse action, or whether the termination was actually motivated by a prohibited factor, such as age. This eminently practical approach appropriately balances the competing claims of anti-discrimination law and autonomy of religious organizations.

B. Lower Courts Disagree About The Application And Scope Of The Ministerial Exception

This case implicates two separate but related issues about the ministerial exception: first, who qualifies as a minister, and second, whether or not the plaintiff is deemed a minister, under what circumstances may a discrimination complaint against a religious organization proceed past the pleading stage? The lower courts have not adopted a consistent approach to either of these questions.

1. The First Amendment protects not only the rights of individual worshipers, but that of organized religious groups as well. This Court has long recognized the right to organize voluntary religious associations. [17] The First

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[17] *Kedroff*, 344 U.S. at 114 (quotation omitted).

Amendment grants these organizations power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine. [18] The [f]reedom to select the clergy, where no improper methods of choice are proven is similarly protected.[19]

Nevertheless, churches are not entitled to complete immunity from all government regulation or all judicial scrutiny of their conduct.[20] Courts have consistently adjudicated disputes involving contracts and property where resolution of the dispute could be made with reference to neutrally applicable laws and without adjudication of ecclesiastical questions.[21]

Anti-discrimination provisions like the ADEA are among those neutral and generally applicable statutes that are applicable to religious organizations. Certainly that was Congress s intent. Title VII of the Civil Rights Act of 1964, for example, contains no general exemption for religious organizations, and indeed its plain language indicates that Congress intended it to apply to religious organizations.[22]

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[18] *Id.* at 116.

[19] *Id.*

[20] *See Employment Div.*, 494 U.S. at 878-880 (explaining that generally applicable laws do not violate the Free Exercise Clause); *Tony & Susan Alamo Found.*, 471 U.S. at 305 (The Establishment Clause does not exempt religious organizations from such secular governmental activity as fire inspections and building and zoning regulations ....).

[21] *See e.g., Jones*, 443 U.S. at 606 (explaining that courts may resolve clams that involve the manner in which churches own property, *hire employees*, or purchase goods) (emphasis added); *Maryland & Va. Eldership of the Churches of God*, 396 U.S. at 367-368; *see also Presbyterian Church*, 393 U.S. at 449 (noting that courts may resolve disputes involving church property where they can do so without resolving underlying controversies over religious doctrine).

[22] Title VII expressly exempts religious organizations from its prohibition against discrimination on the basis of religion. *See* 42 U.S.C. § 2000e-1(a) (This subchapter shall not apply ... to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational

The ADEA was modeled in pertinent part on Title VII, and courts have generally held that the ADEA applies to the personnel actions of religious institutions.[23]

Courts have recognized, however, that anti-discrimination provisions that interfere with a religious organization s choice of spiritual leaders could in some instances interfere with its First Amendment rights. To accommodate these concerns, courts have carved out a ministerial exception. The ministerial exception is not rooted in any textual provision of the pertinent anti-discrimination laws, but rather reflects the courts judgments about the limits that the Religion Clauses of the First Amendment place on the permissible application of those laws. Courts generally agree on the existence of such limits, but disagree on their scope, both with respect to who is covered and whether claims involving discrimination not motivated by religion are covered.[24]

2. One set of disagreements concerns who is properly considered a minister for purposes of the exemption. This inquiry is often dispositive because, in the circuits that have adopted a broad ministerial exception, any employment claim by a minister is barred, regardless of the actual or

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institution, or society of its activities.). The clear negative inference of this limited exemption is that Congress intended Title VII s other prohibitions against discrimination on the basis of race, sex, and national origin to apply to religious organizations, and indeed we have found no decision holding that Title VII or the ADEA is totally inapplicable to religious organizations.

[23] *See DeMarco*, 4 F.3d at 172-173 (concluding that Congress intended the ADEA to apply to religious institutions); *see also Geary*, 7 F.3d at 331; *Weissman*, 38 F.3d at 1045; *Ritter* v. *Mount St. Mary s Coll.*, 814 F.2d 986, 988 n.1 (4th Cir. 1987).

[24] Because the application of the ministerial exception amounts, in effect, to a determination that the pertinent law would be unconstitutional as applied to the particular case, the exception should be limited to what is necessary to comply with the First Amendment. *Bollard*, 196 F.3d at 947; *see also United States* v. *Booker*, 543 U.S. 220, 258 (2005) ([W]e must refrain from invalidating more of [a] statute than is necessary.) (quotation omitted).

asserted reason for the adverse personnel action. Thus, in the decision below, after the court of appeals concluded that petitioner was a minister (even though he is a layperson and held a position not reserved for Catholics), the court ruled that his case could not go forward, regardless of the actual or asserted reason for his termination. As the courts adopting a broad view of the exception have reasoned, the free exercise clause of the First Amendment protects the act of a decision rather than a motivation behind it, [25] and so [t]he [ministerial] exception precludes any inquiry whatsoever into the reasons behind a church s ministerial employment decision. [26]

There is, however, no consistent approach in the lower courts on the question of who is a minister. The Seventh Circuit has adopted perhaps the broadest reading of the exception, concluding that it bars any claim by any employee, religious or lay, who is responsible for conveying the message of [the] organization [27] or whose duties had a significant religious dimension. [28] Thus, the Seventh Circuit has ruled that a press secretary to a Catholic Diocese whose responsibilities included translating materials into Spanish and drafting press releases and correspondence was functionally a minister, under the reasoning that she was involved in communicating the church s religious message to the public even though she was not ordained, required to be a Catholic, or empowered to make any decisions about religious doctrine.[29] The Fourth and Fifth Circuits have focused on whether the plaintiff religious or lay engaged in ac-

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[25] *Rayburn*, 772 F.2d at 1169; *see also Alicea-Hernandez*, 320 F.3d at 703; *Catholic Univ.*, 83 F.3d at 465.

[26] *Roman Catholic Diocese*, 213 F.3d at 801.

[27] *See Alicea-Hernandez*, 320 F.3d at 704.

[28] Pet. App. 8a.

[29] *See Alicea-Hernandez*, 320 F.3d at 703.

tivities traditionally considered ecclesiastical or religious, [30] and whether an employee s primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship. [31] The D.C. Circuit has also ruled that it is immaterial whether the plaintiff was ordained, and that the crucial question is whether the role performed ... is vital to the spiritual and pastoral mission of the church, holding that a university professor of canon law, though not a priest (and indeed forbidden from becoming a priest because of her sex), was nonetheless a minister. [32]

A quite different approach is reflected in the decisions of the Second, Third, Eighth, and Ninth Circuits. Those courts have allowed discrimination complaints to go forward even when the plaintiffs duties had significant religious components, and in some cases even when the plaintiffs were ministers by any definition.[33] Thus, the Second Circuit

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[30] *Starkman*, 198 F.3d at 176 (quotation omitted); *see also Roman Catholic Diocese*, 213 F.3d at 801.

[31] *Rayburn*, 772 F.2d at 1169. The Fourth Circuit s case law is not entirely consistent. It has, for example, allowed a teacher at a religiously-affiliated school to state a claim under the Equal Pay Act of 1963, 29 U.S.C. § 206(d), even though classes at the school were taught from a pervasively religious perspective, and teachers led students in prayer and were required to subscribe to the school s statement of faith as a condition of employment. *See Dole* v. *Shenandoah Baptist Church*, 899 F.2d 1389, 1395-1396 (4th Cir. 1990).

[32] *Catholic Univ.*, 83 F.3d at 464-465. *But see id.* at 471-476 (Henderson, J., concurring) (questioning whether the ministerial exception should apply where the institution offers no religious reason for the adverse employment decision).

[33] Both the Eighth and Ninth Circuits have, however, applied the exception in some cases where the claimant was a member of the clergy. *Werft*, 377 F.3d at 1100, 1104 (applying the exception to a minister s claim that he was discriminated against on the basis of his disability); *Scharon*, 929 F.2d at 362-363 (applying the exception to a priest s age and sex discrimination claims). The Second Circuit has not yet addressed whether adjudication of a church s decision to hire or fire a member of the clergy would necessarily present an impermissible intrusion on the church's First Amendment rights. *See Hankins*, 441 F.3d at 99 (remanding a suit

ruled that the Constitution did not bar an ADEA action brought by a teacher in a Catholic parochial school whose duties included leading his students in prayers and taking them to Mass, even though the school expressly contended that the teacher had been fired because he had failed to fulfill the spiritual mission of the school.[34] As the court explained, the constitutional prohibition against judicial examination of the religious basis of a church s decision to hire a minister is of no moment in the ADEA context because the ADEA applies only where plaintiffs establish that age-discriminatory animus was the but for cause of the challenged employment action. [35] Similarly, the Third Circuit allowed a teacher in a religious school to bring an ADEA action, even though the school alleged that she had been fired for conduct violating church doctrine.[36]

The Eighth Circuit found no constitutional bar to an ADEA action brought by the lay administrator of a synagogue, who, although not a member of the clergy and not empowered to make doctrinal decisions, was the initial point of contact with prospective [synagogue] members, and [was] required to promote a positive image of the Temple among its members and to the general community. [37] As the Eighth Circuit stated, the mere fact that a lay employee has religious duties does not shield a religious employer

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brought by a member of the clergy for analysis under RFRA). A recent decision of the Third Circuit would have extended *Geary* and would have allowed a chaplain of a religiously affiliated university to bring a sex discrimination claim against her former employer. *See Petruska* v. *Gannon Univ.*, 448 F.3d 615, *vacated for panel rehearing*, No. 05-1222, 2006 U.S. App. LEXIS 15088 (3d Cir. June 20, 2006). That decision was vacated for panel rehearing because the authoring judge, Judge Becker, died before the decision was issued and because circumstances arose that indicated that another judge on the panel might have been subject to recusal.

[34] *DeMarco*, 4 F.3d at 168, 172.

[35] *Id.* at 172.

[36] *See Geary*, 7 F.3d at 326-329.

[37] *Weissman*, 38 F.3d at 1040.

from the ADEA. [38] The conflict between that decision and the decisions of the Seventh Circuit is particularly striking. The temple administrator s role in promoting the message and work of the synagogue was quite similar to the function of the press secretary to the Catholic Diocese who the Seventh Circuit concluded *was* functionally a minister and was therefore barred from bringing an employment discrimination suit against the church for which she worked. Each was a layperson; neither was required to be an adherent of the religion of the employer; both were involved in promoting the image and message of the religious institution for which they worked. Nonetheless, the two circuits reached opposite conclusions in the two cases about whether the discrimination suit could go forward.

The decisions of the Ninth Circuit also stand in contrast to the decision below. The Ninth Circuit has held in decisions that have generated sharp disagreements within that circuit that even *ministers* may bring employment discrimination suits in some circumstances. That court has held, for example, that an associate pastor could sue for sexual harassment under a hostile work-environment theory and for retaliatory harassment after she filed a complaint with the EEOC in the face of dissenting opinions arguing that the decision conflicted with the case law of several other circuits.[39] The court has also held that a Jesuit novitiate could sue under Title VII under the theory that sexual harassment caused his constructive discharge from his seminary and from the Jesuit order.[40] Although the Ninth Cir-

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[38] *Id.* at 1045.

[39] *See Elvig*, 375 F.3d at 955-965. *But see id.* at 975-979 (Trott, J., dissenting) (arguing that decision conflicted with decisions of other circuit); *Elvig*, 397 F.3d at 801-803 (Kleinfeld, O Scannlain, Callahan, and Bea, JJ., dissenting from rehearing en banc) (same).

[40] *See Bollard*, 196 F.3d at 944-947. The court noted that it was critical that the plaintiff was constructively discharged rather than actually discharged, *id.* at 947, although the Ninth Circuit later found that the ministerial exception barred a plaintiff s claim that he was forced to resign

cuit appears not to allow ministers to base employment discrimination claims on actual hiring and firing,[41] it is clear that in the Ninth Circuit even ministers may not fall within the ministerial exception, whereas in the Seventh Circuit the category of ministers includes press secretaries and organists. Review by this Court is needed to clarify which employees of religious organizations are to be considered ministers for purposes of the exception.

3. A related disagreement among the circuits concerns whether permitting a discrimination suit against a religious organization to go forward turns on whether the employer has asserted or is likely to assert a religious reason for the challenged employment action. The approach of the Fourth, Fifth, Seventh, and D.C. Circuits, as discussed above, is that no discrimination claim may be made by a minister at all, regardless of the actual or asserted reason for the adverse employment action. In the view of those courts, the constitutional protection applies to the action, not the reason for the action.[42] Thus, those courts have dismissed discrimination cases even when no religious-based justification for the action appeared in the record (as occurred in this case).

The Second and Third Circuits, by contrast, have reasoned that the Constitution prohibits scrutiny only of the *religious* reasons for the actions of religious organizations, and so courts may decide whether a plaintiff s termination in fact resulted from a prohibited secular purpose rather than a religious one. In those circuits, if a defendant offers a religious justification for its action, the plaintiff may not challenge that justification as false under the applicable religious doctrine, but the plaintiff may nonetheless attempt to

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because the church refused to accommodate his disability, *Werft*, 377 F.3d at 1100, 1104.

[41] *See Elvig*, 375 F.3d at 961.

[42] *See, e.g., Roman Catholic Diocese*, 213 F.3d at 801; *Rayburn*, 772 F.2d at 1169; *Alicea-Hernandez*, 320 F.3d at 703.

show that that proffered justification was not, in fact, the real reason for the adverse personnel action. As the Second Circuit has explained, because the inquiry is directed toward determining whether the articulated purpose is the actual purpose for the challenged employment-related action[,] ... in those cases where a defendant proffers a religious purpose for its allegedly discriminatory employment action, a plaintiff will usually be able to challenge as pretextual the employer s justification without calling into question the value or truthfulness of religious doctrine. [43] In those circumstances, [a] fact-finder will necessarily have to presume that an asserted religious motive by the employer accurately reflects the religious doctrine on which the employer relies, but could nonetheless conclude, based on the demonstrated facts, that that motive was not what animated the challenged employment action.[44]

The Third Circuit has adopted much the same rule. As that court has explained, even when an employer asserts a religious justification for an adverse employment action, a plaintiff may seek to prove that the action in fact reflected prohibited discrimination. So long as [the plaintiff] does not challenge the validity of the religious doctrine on which the employer relies, the court may determine whether the religious reason ... actually motivated the dismissal of the plaintiff.[45] The plaintiff may attempt to show that the proffered religious justification was a pretext for the actual reason for the dismissal, and as long as the pretext inquiry neither traverses questions of the validity of religious beliefs nor forces a court to choose between parties competing religious visions, that inquiry does not present a significant risk of entanglement. [46]

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[43] *See DeMarco*, 4 F.3d at 171.

[44] *See id.*

[45] *See Geary*, 7 F.3d at 329.

[46] *See id.* at 330. The Third Circuit reaffirmed this approach in its recent decision in *Petruska*, which has been vacated for panel rehearing.

The Second and Third Circuits express approval of pretext inquiries in age discrimination suits against religious employers stands in sharp contrast to the decision below. In this case, the Seventh Circuit speculated that, if the case proceeded past the pleading stage, the Diocese *might* offer a religious justification for its termination of petitioner (namely, disagreement over the suitability of particular music for Easter Mass), and in response petitioner *might* ask the court to conclude that this justification was pretextual because the music that petitioner desired to have played at Easter Mass was actually more suitable than the music that the church hierarchy desired to have played.[47]

In fact, petitioner has not alleged that he and the Diocese had any substantive disagreement over music for Easter Mass, and the Diocese has not argued that petitioner was fired because of any such disagreement. But even putting those points aside, the decisions of the Second and Third Circuit show why, even if this case were to proceed to discovery and trial, there need never be any occasion for any court to decide the religious and metaphysical issue of which music is more suitable for Easter Mass. If the Diocese argues in this case that petitioner was fired because of a disagreement over music for Easter Mass, the court may not question the Diocese's assertion that its choice of music was

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As the *Petruska* panel explained, the defendant had not proffered a religious justification for its termination of the plaintiff, and the court could not conclude on a motion to dismiss that the suit would necessarily require examination of religious belief, religious doctrine, or internal church regulation. 448 F.3d at 632. The mere fact that the religious organization would be likely to defend its employment action on grounds related to church needs rooted in church doctrine also did not require a court to prophylactically disregard the command of Congress and dismiss the case. *Id.* at 634 (quotation omitted). Even if such an issue arose in the course of the suit, the court said, it might be possible for the litigation to proceed. *Id.* at 632-633. If the church asserted that the employment decision was based on religious beliefs, the employee would still be able to claim that that was not the basis for the decision, although she would not be able to challenge the religious rationale itself. *Id.*

[47] *See* Pet. App. 6a-7a.

more suitable for that religious event than petitioner s. What the court *may* conclude, based on the type of a pretext inquiry with which federal courts hearing discrimination cases are very familiar, is that this religious explanation is simply a *post hoc* rationalization offered to justify what, in fact, was a decision based on age. A court might reach that conclusion if, for example, the Diocese had never offered a religious reason for petitioner s termination before the lawsuit was commenced, or if there was no evidence that the Church hierarchy had ever expressed its dissatisfaction with petitioner s choice of music before his termination, or if members of the Church hierarchy had made inconsistent statements about the reasons for petitioner s termination. Each of those circumstances would provide a neutral, secular reason for concluding that the supposed religious justification was a pretext, without requiring the court to decide whose choice of music provided a more suitable religious experience for Easter Mass.

In short, if this case had been brought in the Second or Third Circuits, the Diocese s motion to dismiss would not have been well-taken, and petitioner would have been allowed to proceed to discovery in his effort to prove that the Diocese fired him because of his age. The scope of the court s adjudication of his discrimination complaint might have been circumscribed in some respects by constitutional concerns namely, the court could not second-guess the Diocese s assertion, were it ever made, that its choice of music was better for Easter Mass than petitioner s choice but that limited constraint would not have prevented petitioner from attempting to prove, through several other means, that his termination violated the ADEA.

C. Lower Courts Also Disagree On Whether The Ministerial Exception Has Been Superseded By The Religious Freedom Restoration Act

This case also provides the Court with the opportunity to resolve a circuit split concerning the relationship between the ministerial exception and the Religious Freedom Restoration Act (RFRA), 42 U.S.C. §§ 2000bb *et seq.* The ministe-

rial exception, as discussed above, is not based on the text of federal anti-discrimination statutes, but rather reflects the courts determination that application of those laws in particular cases could run afoul of the First Amendment. One court of appeals has now concluded that Congress, in RFRA, has provided explicit direction to the courts about the permissible application of federal employment discrimination law to religious organizations, and that this explicit direction has superseded the judicially-crafted ministerial exception.

In *Hankins* v. *Lyght*, 441 F.3d 96 (2d Cir. 2006), the Second Circuit recently held that RFRA superseded the ministerial exception to employment discrimination laws. The court concluded that RFRA must be deemed the full expression of Congress s intent with regard to the religion-related issues before us and displace earlier judge-made doctrines that might have been used to ameliorate the ADEA s impact on religious organizations and activities. [48] Although RFRA applies by its terms only to governmental action, the court concluded that RFRA applies to a discrimination lawsuit between private parties because the substantive prohibitions of the ADEA do not change depending on whether the suit is brought by the EEOC, a government agency to which RFRA clearly applies, or private plaintiffs.[49]

The Seventh Circuit rejected this ruling and concluded that RFRA has not superseded the ministerial exception.[50]

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[48] 441 F.3d at 102. The court relied on *City of Milwaukee* v. *Illinois*, 451 U.S. 304 (1981), suggesting that it viewed the enactment of RFRA like the enactment of the Clean Water Act, which superseded the pre-existing federal common law of interstate water pollution that had been crafted by the courts without guidance from Congress. *See Hankins*, 441 F.3d at 102-103 (quoting *City of Milwaukee*, 451 U.S. at 314).

[49] *See Hankins*, 441 F.3d at 103.

[50] Pet. App. 10a-11a. This Court may address the relationship between RFRA and the ministerial exception even though neither party raised that issue in the court of appeals. This Court s traditional rule is that it may review an issue not pressed so long as it has been passed upon in the court of appeals. *United States* v. *Williams*, 504 U.S. 36, 41-42 (1992); *see also Virginia Bankshares, Inc.* v. *Sandberg*, 501 U.S. 1083,

The court noted that the Second Circuit s decision would if sound invalidate the many decisions in this and other circuits recognizing the ministerial exception. [51] But the court found the Second Circuit s ruling unsound, concluding that RFRA is applicable only in suits to which the government is a party. [52] The court also stated that replacement of the ministerial exception with RFRA could raise a serious constitutional issue . . . if Congress . . . required federal courts to decide religious questions. [53]

Whether a case is governed by the ministerial exception, especially as broadly construed by the Seventh Circuit, or by RFRA, may well be outcome-determinative. The Seventh Circuit stated, for example, that RFRA s protection for religious activity may well be less expansive than the protection offered by the judicially-crafted ministerial exception because RFRA requires the religious organization to show that the application of the federal law imposes a substantial burden on its religious activity.[54]

That showing cannot be made in this case, at least at this stage, where the case has not advanced past the initial pleading. This case was decided on a motion to dismiss, and the Diocese has never argued that plaintiff was terminated for a religious reason. The complaint provides no basis for the Diocese to argue that application of the ADEA to provide a remedy to a lay employee who was terminated because of age-based animus would substantially burden the

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1099 n.8 (1991). In this case, the court of appeals squarely addressed and decided whether RFRA has superseded the ministerial exception.

[51] Pet. App. 10a.

[52] *Id.*

[53] *Id.* at 11a.

[54] *See id.* at 10a; 42 U.S.C. § 2000bb-1(a); *see also, e.g., Worldwide Church of God* v. *Philadelphia Church of God, Inc.*, 227 F.3d 1110, 1120-1121 (9th Cir. 2000) (declining to hold private copyright action barred by RFRA, in part because the church failed to demonstrate that the copyright laws subject it to a substantial burden in the exercise of its religion).

Diocese s religious activity. Accordingly, if RFRA were to govern here rather than the ministerial exception, the Seventh Circuit s decision affirming the dismissal of the complaint would have to be reversed and the case remanded to allow petitioner to do what he has attempted to do all along: prove that he was fired because of his age.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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